Supreme Court, U.S.
FILED
MAR 1 1996
CLERK

(8)

No. 95-719

IN THE

Supreme Court of the United States

October Term, 1995

WILLIAM GASPERINI, *Petitioner,*

v.

THE CENTER FOR HUMANITIES, *Respondent.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF FEDERAL JURISDICTION AND LEGAL HISTORY SCHOLARS AKHIL REED AMAR, ERWIN CHEMERINSKY, DANIEL R. COQUILLETTE, ARTHUR F. McEVOY AND ARTHUR R. MILLER, AND OF TRIAL LAWYERS FOR PUBLIC JUSTICE, AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

ARTHUR R. MILLER
1545 Massachusetts Ave.
Cambridge, MA 02138

AKHIL REED AMAR
127 Wall Street
New Haven, CT 06520

DANIEL R. COQUILLETTE
885 Centre Street
Newton Centre, MA 02159

ARTHUR F. McEVOY
Counsel of Record
975 Bascom Mall
Madison, WI 53706
(608) 265-4771

ERWIN CHEMERINSKY
699 Exposition Blvd.
Los Angeles, CA 90089

[Additional Counsel Listed on Inside Cover]

March 1, 1996

BATEMAN & SLADE, INC BOSTON, MASSACHUSETTS

418

WILLIAM B. HIRSCH
CHRISTINE J. ANDERSON
LIEFF, CABRASER, HEIMANN
& BERNSTEIN
275 Battery Street
30th Floor
San Francisco, CA 94411

ARTHUR H. BRYANT
WILLIAM A. ROSSBACH
TRIAL LAWYERS FOR
PUBLIC JUSTICE, P.C.
1717 Massachusetts Ave.
Washington, D.C. 20036
(202) 797-8600

KENNETH J. CHESEBRO
1600 Massachusetts Ave.
Cambridge, MA 02138

JONATHAN S. MASSEY
3920 Northampton St., N.W.
Washington, D.C. 20015

Counsel for *Amici Curiae*

TABLE OF CONTENTS

INTEREST OF *AMICI CURIAE* 1

INTRODUCTION AND SUMMARY OF ARGUMENT 2

ARGUMENT 4

I. THE RE-EXAMINATION CLAUSE OF THE SEVENTH AMENDMENT BARS FEDERAL APPELLATE COURTS FROM ENGAGING IN DE NOVO OR WEIGHT-OF-THE-EVIDENCE REVIEW OF ANY FACT FOUND BY A JURY 4

A. At Least 20 Decisions of This Court Have Relied on the Seventh Amendment to Bar *De Novo* or Weight-of-the-Evidence Review by Federal Appellate Courts 6

B. The Historical Evidence Strongly Supports This Court's Prior Decisions 12

1. *English common-law practice* 12

2. *The genesis of the Seventh Amendment* 15

C. The Asserted Justifications for Weight-of-the-Evidence Appellate Review are Demonstrably Inadequate 18

II. THE EXISTING JUDICIAL CODE SHOULD NOT BE CONSTRUED AS AUTHORIZING *DE NOVO* OR WEIGHT-OF-THE-EVIDENCE REVIEW BY FEDERAL APPELLATE COURTS 22

CONCLUSION 30

TABLE OF AUTHORITIES

CASES

Abney v. United States, 431 U.S. 651 (1977) 20
Aetna Life Ins. Co. v. Ward, 140 U.S. 76 (1891) 6
Affolder v. New York, C. & St. L. R.R., 339 U.S. 96 (1950) 10
Anderson v. Pacific Coast S.S. Co., 225 U.S. 187 (1912) 23
Ankenbrandt v. Richards, 112 S. Ct. 2206 (1992) 24
Arkansas Valley Land & Cattle Co. v. Mann, 130 U.S. 69 (1889) 9
Ashland Oil, Inc. v. Arnett, 875 F.2d 1271 (7th Cir. 1989) 27
Ashwander v. TVA, 297 U.S. 288 (1936) 22
Baltimore & Carolina Line, Inc. v. Redman,
295 U.S. 654 (1935) 21
Bank of the United States v. DeVeaux,
9 U.S. (5 Cranch) 61 (1809) 28
Barreda v. Silsbee, 62 U.S. (21 How.) 146 (1858) 6, 8-9
Behrens v. Pelletier, 64 U.S.L.W. 4081, (U.S. Feb. 21, 1996) .. 29
Bingham v. Cabot, 3 Dall. 19 (1795) 21
Blodgett v. Holden, 275 U.S. 142 (1927) 22
Browning-Ferris Industries of Vermont, Inc. v.
Kelco Disposal, Inc., 492 U.S. 257 (1989) 11
Brunneman v. Terra Int'l, Inc., 975 F.2d 175 (5th Cir. 1992) ... 27
Capital Traction Co. v. Hof, 174 U.S. 1 (1899) 12
Chohlis v. Cessna Aircraft Co., 760 F.2d 901 (8th Cir. 1985) .. 10
Cohens v. Virginia, 19 U.S. (6 Wheat) 264 (1821) 28
Colgrove v. Battin, 413 U.S. 149 (1973) 5
Compton v. Luckenbach Overseas Corp., 425 F.2d 1130
(2d Cir.), *cert. denied*, 400 U.S. 916 (1970) 10
Concrete Pipe of Cal. v. Laborers Pension Tr.,
113 S. Ct. 2264 (1993) 22
Consorti v. Armstrong World Industries, Inc.,
72 F.3d 1003, 1013 & n.10 (2d Cir. 1995) 5
Continental Cas. v. S.W. Bell Telephone Co., 860 F.2d 970
(10th Cir. 1988), *cert. denied*, 489 U.S. 1079 (1989) 27
Cooper Distributing Co. v. Amana Refrigeration, Inc.,
63 F.3d 262 (3rd Cir. 1995) 27
Curtis v. Loether, 415 U.S. 189 (1974) 22
Czajka v. Black, 901 F.2d 1484 (8th Cir. 1990) 10
Dadurian v. Underwriters at Lloyd's, London,
787 F.2d 756 (1st Cir. 1986) 27

Dagnello v. Long Island R.R., 289 F.2d 797(2d Cir. 1961) 10
Dimick v. Schiedt, 293 U.S. 474 (1935) 7, 19
District of Columbia v. Clawans, 300 U.S. 617 (1937) 20
Dunlap-McCuller v. Riese Organization, 980 F.2d 153
(2d Cir. 1992), *cert. denied*, 114 S.Ct. 290 (1993) 10
Eiland v. Westinghouse Elec. Corp.,
58 F.3d 176 (5th Cir. 1995) 27
Erie R.R. v. Tompkins, 304 U.S. 64 (1938) 5
Fairmount Glass Works v. Cub Fork Coal Co.,
287 U.S. 474 (1933) 8-9, 13-14, 18, 23
Finley v. United States, 490 U.S. 551 (1989) 24
Folsom, see *Insurance Co. v. Folsom*, below 6, 8-9
Ford Motor Co. v. Summit Motor Products, Inc.,
930 F.2d 277 (3rd Cir.), *cert. denied*, 502 U.S. 939 (1991) . 27
Fourco Glass Co. v. Transmirra Prods. Corp.,
353 U.S. 222 (1957) 23-24
Fraloff, see *Railroad Co. v. Fraloff*, below 7-8
Georgia v. Brailsford, 3 U.S. (3 Dall.) 1 (1794) 21
Green v. American Airlines, Inc., 804 F.2d 453 (8th Cir. 1986) . 10
Grunenthal v. Long Island Railroad, 393 U.S. 156 (1968) 11
Hansen v. Boyd, 161 U.S. 397 (1896) 6
Healy v. Ratta, 292 U.S. 263 (1934) 23
Hendricks & Associates, Inc. v. Daewoo Corp.,
923 F.2d 209 (1st Cir. 1991) 27
Herencia v. Guzman, 219 U.S. 44 (1910) 7, 9
Honda Motor Co. v. Oberg, 114 S. Ct. 2331 (1994) . 14, 20, 21, 25
Hooper v. California, 155 U.S. 648 (1895) 22
Huckle v. Money, 95 Eng. Rep. 768, 769 (C.P. 1763) 21
Insurance Co. v. Folsom, 85 U.S. (18 Wall.) 237 (1873) 6, 8-9
Insurance Co. of North America v. Valente,
933 F.2d 921 (11th Cir. 1991) 27
Jackson v. Virginia, 443 U.S. 307 (1979). 25
Jordan v. United States Lines, Inc.,
738 F.2d 48 (1st Cir. 1984) 28
Jowers v. Nationwide Ins. Co., 832 F.2d 1246 (11th Cir. 1987) . 27
Jurgen v. Linesburgh, 159 A.D.2d 689,
553 N.Y.S.2d 438 (2d Dept. 1990) 5
The Justices v. Murray, 76 U.S. 274 (1870) 17
Katara v. D.E. Jones Commodities, Inc.,
835 F.2d 966 (2nd Cir. 1987) 27

Keeler v. Richards Mfg. Co., Inc.,
817 F.2d 1197 (5th Cir. 1987) 27
Kennon v. Gilmer, 131 U.S. 22 (1889) 6
Kirschhoffer v. Van Dyke, 173 A.D.2d 7,
577 N.Y.S.2d 512 (2d Dept. 1991) 5
LaFollette v. Savage, 63 F.3d 540 (7th Cir. 1995) 28
Lincoln v. Power, 151 U.S. 436 (1894) 7-9
Louisville and Nashville R.R. v. Woodson,
134 U.S. 614 (1890) 25
Lumberman's Mut. Cas. Co. v. Elbert, 348 U.S. 48 (1954) 8
Marine Ins. Co. of Alexandria v. Young,
9 U.S. (5 Cranch) 187 (1809) 6
McDaniels, see *Wabash Ry. v. McDaniels*, below 8-9
McKane v. Durston, 153 U.S. 684 (1894) 20
Metropolitan R.R. v. Moore, 121 U.S. 558 (1887) . 8, 9, 14, 19, 26
Miller v. Maryland Cas. Co., 40 F.2d 463 (2d Cir. 1930) 9, 19
Moore, see *Metropolitan R.R. v. Moore*, above 9, 14, 19, 26
Neese v. Southern Railway Co., 350 U.S. 77 (1955) 10, 22
Newman-Green, Inc. v. Alfonzo-Larrain, 490 U.S. 826 (1989) . 11
Newmont Mines Ltd. v. Hanover Ins. Co.,
784 F.2d 127 (2d Cir. 1986) 10
New York, Lake Erie & W. R. Co. v. Winter's Adm'r,
143 U.S. 60 (1892) 8
NLRB v. Catholic Bishop of Chicago, 440 U.S. 490 (1979) 22
O'Connor v. Graziosi, 131 A.D.2d 553, 516 N.Y.S.2d 276
(2d Dept.), *appeal denied*, 70 N.Y.2d 613 (1987) 4
Pariser v. City of New York, 146 F.2d 431 (2d Cir. 1945) 9
Parklane Hosiery Co. v. Shore, 439 U.S. 322 (1979) 15
Parsons v. Bedford, 28 U.S. (3 Pet.) 433 (1830) 5, 9, 18
Pasquale v. Miller, 194 A.D.2d 597,
599 N.Y.S.2d 58 (2d Dept. 1993) 5
Pennsylvania v. Finley, 481 U.S. 551 (1987) 20
Pernell v. Southall Realty, 416 U.S. 363 (1974) 22
Pinner v. Schmidt, 805 F.2d 1258 (5th Cir. 1986),
cert. denied, 483 U.S. 1022, 1032 (1987) 27
Pittsburgh, Cincinnati & Chi. Ry. v. Backus,
154 U.S. 421 (1894) 25
Portman v. American Home Products Corp.,
201 F.2d 847 (2d Cir. 1953) 3, 9
Pulla v. Amoco Oil Co., 72 F.3d 648 (8th Cir. 1995) 27

Railroad Co. v. Fraloff, 100 U.S. 24 (1879) 7-8
Richards v. Michelin Tire Corp., 21 F.3d 1048 (11th Cir. 1994), *cert. denied*, 115 S. Ct. 902 (1995) 27
Ross v. Black & Decker, Inc., 977 F.2d 1178 (7th Cir. 1992), *cert. denied*, 507 U.S. 917 (1993) 27
St. Louis, Iron Mtn. & S. Ry. v. Craft, 237 U.S. 648 (1915) 7, 9, 19
Schwartz v. Capital Liquidators, Inc., 984 F.2d 53 (2d Cir. 1993) 10
Second Employers' Liab. Cases v. New York, New Haven & Hartford R.R., 223 U.S. 1 (1912) 28
Silsbee, see *Barreeda v. Silsbee*, above 6, 8-9
Slocum v. New York Life Ins. Co., 228 U.S. 364 (1913) 5, 20
Solomon Dehydrating Co. v. Guyton, 294 F.2d 439 (8th Cir.), *cert. denied*, 368 U.S. 929 (1961) 10
Southern Ry. v. Bennett, 233 U.S. 80 (1914) 7, 9, 20
Standard Havens Products v. Gencor Industries, 953 F.2d 1360 (Fed. Cir. 1991), *cert. denied*, 506 U.S. 817 (1992) 27
Stonewall Ins. Co. v. Asbestos Claims Mgmt. Corp., 1995 U.S. App. Lexis 35230 (2d Cir. Dec. 13, 1995) 4, 10, 28
Tennant v. Peoria & Pekin Union Ry., 321 U.S. 29 (1944) 6
Texas & Pacific Ry. v. Behymer, 189 U.S. 468 (1903) 9
Texas & Pacific Ry. v. Hill, 237 U.S. 208 (1915) 7
Thongvanh v. Thalacker, 17 F.3d 256 (8th Cir. 1994) 10
Tull v. United States, 481 U.S. 412 (1987) 22
Unisplay v. American Electronic Sign Co., 69 F.3d 512 (Fed. Cir. 1995) 27
United States v. Laub, 37 U.S. (12 Pet.) 1 (1838) 6
United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940) .. 8
Wabash Ry. v. McDaniels, 107 U.S. 454 (1883) 8-9
Walker v. New Mexico R.R., 165 U.S. 593 (1897) 3
Waters-Pierce Oil Co. v. Deselms, 212 U.S. 159 (1909) 9
Whalen v. Unit Rig, Inc., 974 F.2d 1248 (10th Cir. 1992), *cert. denied*, 507 U.S. 973 (1993) 28
Williams v. Chevron U.S.A., Inc., 875 F.2d 501 (5th Cir. 1989) 27
Williamson v. Osenton, 220 F. 653 (C.C.A.) 9
Wilson v. Everett, 139 U.S. 616 (1891) 7
Wiscart v. D'Auchy, 3 U.S. (3 Dall.) 321 (1796) 25
Zobrest v. Catalina Foothills School Dist., 113 S. Ct. 2462 (1993) 22

CONSTITUTION, STATUTES AND RULES

U.S. Const., art. III, § III 16-17, 27
U.S. Const., Amendment V 20-21
U.S. Const., Amendment VII ..... *passim*
U.S. Const., Amendment XIV 21
Judiciary Act of 1789, § 17, 1 Stat. 83 ..... 17, 23
Judiciary Act of 1789, § 22, 1 Stat. 84-85 ..... 3, 17-18, 23
Common Law Procedure Act (England, 1854) 14
Judicial Code of 1928, 45 Stat. 54 23
Judicial Code of 1940, 28 U.S.C. §§ 861a, 861b, 879 23-24
Judicial Code of 1948, 28 U.S.C. §§ 2105, 2106 .. 3, 10, 18, 23-24
N.Y. Civ. Prac. L. & R. § 5501(c) (McKinney Supp. 1995) 4
Fed. R. Civ. P. 52(a) 24
Fed. R. Civ. P. 59 ..... 2, 23

MISCELLANEOUS

THE FEDERALIST NO. 83 (H. Lodge ed. 1888) 17
Hon. Ruggero J. Aldisert, WINNING ON APPEAL (1992) 29
Akhil Reed Amar, *Article III and the Judiciary Act of 1789*, 138 U. PA. L. REV. 1499 (1990) 16
Akhil R. Amar, *The Bill of Rights As a Constitution*, 100 YALE L.J. 1131 (1991) 21
Akil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757 (1994) 21
Akhil Reed Amar, *Marbury, Section 13, and the Original Jurisdiction of the Supreme Court*, 56 U. CHI. L. REV. 443 (1989) 16
Bernard Bailyn, THE ORIGINS OF AMERICAN POLITICS (1968) .. 15
Akhil Reed Amar and Vikram David Amar, *Is the Presidential Succession Law Constitutional?*, 48 STAN. L. REV. 113 (1995) 16
J.H. Baker, AN INTRODUCTION TO ENGLISH LEGAL HISTORY (2d ed. 1990). 12-15
Thomas E. Baker, RATIONING JUSTICE ON APPEAL: THE PROBLEMS OF THE U.S. COURTS OF APPEALS (1994) ... 30

Paul M. Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441 (1963)25-26
William Blume, *Review of Fact in Jury Cases — The Seventh Amendment*, 20 J. AM. JUD. SOC. 130 (1936) 19
Hon. Stephen Breyer, *Administering Justice in the First Circuit*, 24 SUFFOLK UNIV. L. REV. 29 (1990) 30
A.T. Carter, A HISTORY OF ENGLISH LEGAL INSTITUTIONS (1986) 13
Cooley's BLACKSTONE (4th Am. ed. 1899) 13-14
W.R. Cornish & G. de N. Clark, LAW AND SOCIETY IN ENGLAND 1750-1950 (1989) 12
Jonathan Elliot, 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION (1836) 16-17
Hon. Patrick E. Higginbotham, *Continuing the Dialogue: Civil Juries and the Allocation of Judicial Power*, 56 TEX. L. REV. 47 (1977) 3, 17
1 Homer Carey Hockett, THE CONSTITUTIONAL HISTORY OF THE UNITED STATES (1939) 15
W.S. Holdsworth, A HISTORY OF ENGLISH COMMON LAW (2d ed. 1922) 13
Morton Horwitz, THE TRANSFORMATION OF AMERICAN LAW, 1780-1860 (1977) 21
Hon. Edith H. Jones, *Back to the Future for Federal Appeals Courts: Rationing Federal Justice by Recovering Limited Jurisdiction*, 73 TEX. L. REV. 1485 (1995) 29
Judicial Conference of the United States, Long Range Plan for the Federal Courts (Dec. 1995) 29
A.K.R. Kiralfy, POTTER'S OUTLINES OF ENGLISH LEGAL HISTORY (5th ed. 1958) 13-14
Martin B. Louis, *Allocating Adjudicative Decision Making Authority Between the Trial and Appellate Levels: A Unified View of the Scope of Review, the Judge/Jury Question, and Procedural Discretion*, 64 N.C. L. REV. 993 (1986) 20
Hon. Howard T. Markey, *On the Present Deterioration of the Federal Appellate Process: Never Another Learned Hand*, 33 S.D. L. REV. 371, (1988) 30
John Marshall Mitnick, *From Neighbor-Witness to Judge of Proofs: The Transformation of the English Civil Juror*, 32 AM. J. LEGAL HIST. 201 (1988) 14

Note, *Appealability of Rulings on Motion for New Trial in the Federal Court*, 98 U. PA. L. REV. 575 (1950) 13
J. Wilson Parker, *Free Expression and the Function of the Jury*, 65 B.U. L. REV. 483 (1985). 16
Pittman, *Jasper Yeate's Notes on the Pennsylvania Ratifying Convention*, 22 W. & MARY Q. 301 (1965) 17
Richard A. Posner, THE FEDERAL COURTS: CRISIS AND REFORM (1985) 30
Roscoe Pound, THE DEVELOPMENT OF CONSTITUTIONAL GUARANTEES OF LIBERTY (1957) 15
G.R.Y. Radcliffe & Geoffrey Cross, THE ENGLISH LEGAL SYSTEM (3d ed. 1954) 12-14
Remarks of Chief Justice William H. Rehnquist, Tenth Annual Judicial Conference of the United States Court of Appeals for the Federal Circuit, 146 F.R.D. 256 (Apr. 30, 1992) 29
Hon. Stephen Reinhardt, *Surveys Without Solutions: Another Study of the United States Courts of Appeals*, 73 TEX. L. REV. 1505 (1995) 29
Robert E. Riggs, *Constitutionalizing Punitive Damages: The Limits of Due Process*, 52 OHIO ST. L. REV. 859 (1991) ... 21
E.W. Sutherland, *The Problem of Appellate Review*, 5 TEX. L. REV. 126 (1927) 18
Note, Maxfield Weisbrod, *Limitations on Trial By Jury In Illinois*, 19 CHI. KENT L. REV. 91 (1940) 14
Charles Wolfram, *The Constitutional History of the Seventh Amendment*, 57 MINN. L. REV. 639 (1973) 17
Charles Alan Wright, *The Doubtful Omniscience of Appellate Courts*, 41 TEX. L. REV. 751 (1957). 26
Charles Alan Wright, LAW OF THE FEDERAL COURTS (5th ed. 1994) 12, 15
Charles Alan Wright, *The Overloaded Fifth Circuit: A Crisis in Judicial Administration*, 42 TEX. L. REV. 949 (1964) . 29-30
Charles Alan Wright, Arthur R. Miller and Mary Kay Kane, FEDERAL PRACTICE & PROCEDURE: CIVIL 2D (2d ed. 1995) 4, 9, 12, 14-15, 19, 27, 29

INTEREST OF *AMICI CURIAE*

This brief is submitted by several federal jurisdiction and legal history scholars and by a national public interest law firm.[1] *Amici* have no interest in the outcome of the particular lawsuit at bar, but they have a strong interest in the proper understanding of federal jurisdiction and of the jury system in the United States.

Akhil Reed Amar is the Southmayd Professor of Law at Yale Law School, where he teaches constitutional law, federal jurisdiction and legal history, among other subjects. He has published extensively on the history surrounding the drafting and ratification of the Constitution and of the Bill of Rights, devoting significant attention to the jurisdictional framework of the federal courts and the history of the Seventh Amendment.

Erwin Chemerinsky is the Legion Lex Professor of Law at the University of Southern California Law Center, where he teaches federal courts, civil procedure, and constitutional law. His publications include *Federal Jurisdiction* (2d ed. 1994) and *Interpreting the Constitution* (1987).

Daniel R. Coquillette is a Professor of Law and Former Dean at Boston College Law School, and is currently a Visiting Professor of Law at Harvard Law School. He is a past Director of the American Society for Legal History and has published and taught extensively in the fields of American and English legal history. He has a particular interest in the history of trial by jury at common law and is the co-author of an article on this subject on which this Court relied in *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 333 (1979). He also serves on the Board of Editors of *Moore's Federal Practice*.

Arthur F. McEvoy III holds a joint appointment as Professor of Law and Professor of History at the University of Wisconsin, Madison, and has published extensively in the fields of American history and American legal history. He was a professor of history at Northwestern University from 1980 to 1993, and a Research Fellow at the American Bar Foundation from 1989 to 1994. He has a particular interest in the history of judicial review of jury verdicts in the United States, and was counsel of record on an *amicus* brief filed by legal historians on that issue which was cited by this Court in *Honda Motor Co. v. Oberg*, 114 S. Ct. 2331, 2336 n.2 (1994).

---

[1] Consent letters have been filed with the Clerk of the Court.

Arthur R. Miller is the Bruce Bromley Professor of Law at Harvard Law School, where he teaches federal civil procedure, among other subjects. He is a co-author of a leading multi-volume treatise on federal practice and procedure which contains a detailed analysis of the Seventh Amendment issue presented in this case.

Trial Lawyers for Public Justice, P.C., is a national public interest law firm, supported by over 1500 attorneys, that is devoted to representing victims of corporate and government abuse. It is dedicated to the preservation of the civil jury system for providing fair and reasonable compensation to injured persons.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case presents the question of whether a federal appellate court may overturn, as excessive, a jury's award of compensatory damages if the court concludes that the award "materially deviates from what is reasonable compensation," Pet. App. 8a, even where a district court has considered and rejected a post-trial claim of excessiveness under Fed. R. Civ. P. 59. As the Court of Appeals explained, it was not inquiring into whether the award was reasonable, rationally supported by the evidence, or even "so excessive as to shock the conscience of the court." Pet. App. 8a. Rather, the court applied the law of New York, which accords "less deference to the jury's award." *Id.* The Court of Appeals erred in two fundamental ways.

I. In the 205 years since the adoption of the Seventh Amendment, this Court has never approved of the kind of appellate review practiced in this case. Indeed, for the first century and a half of our Nation's history, it was universally accepted that federal appellate courts lacked the authority to engage in weight-of-the-evidence review of any factual issues in jury cases, including damage awards. This Court so held in at least 20 decisions — including opinions authored by Justice Holmes and Justice Brandeis — none of which has ever been overruled. Those decisions were correct.

The Seventh Amendment bars re-examination of any fact found by a jury other than according to the rules of the common law. At common law, there was simply no appellate review of the weight of the evidence. In ordinary cases, an itinerant "*nisi prius*" justice would

travel to the county where the jurors resided in order to conduct the trial. After trial at *nisi prius* the record was returned to Westminster, where judgment was pronounced by the full trial court. Before entry of a judgment, additional review by the court was possible. A new trial could be granted only where the *nisi prius* judge certified that the verdict was against all the evidence, and succeeded in persuading his colleagues on an en banc panel at Westminster to join him in ordering such a result. A disappointed litigant could not appeal whatever decision the en banc panel made.

To permit federal courts of appeals to order new trials based on their own views of whether jury verdicts are against the weight of the evidence would permit re-examination of facts found by a jury in a way that was unknown at common law. The Seventh Amendment "requires that questions of fact in common law actions shall be settled by a jury, and that the court shall not assume directly or indirectly to take from the jury for itself such prerogative." *Walker v. New Mexico & S. Pac. R.R.*, 165 U.S. 593, 596 (1897). Indeed, the Seventh Amendment reflects a deliberate decision to restrict judicial power and particularly to limit "appellate jurisdiction over matters of fact." Hon. Patrick E. Higginbotham, *Continuing the Dialogue: Civil Juries and the Allocation of Judicial Power*, 56 TEX. L. REV. 47, 50 (1977).

II. Apart from the Seventh Amendment, there are powerful reasons for this Court to hold, as a matter of statutory interpretation, that federal appellate courts lack the authority to engage in weight-of-the-evidence review. Congress banned all such review by statute in Section 22 of the Judiciary Act of 1789. Consistent with the well-established principles that federal jurisdictional statutes are to be narrowly construed, and that all statutes should be construed where possible to avoid constitutional problems, this Court should decline to find any intent by Congress, in its 1948 revision and recodification of the Judicial Code, to lift that ban in cases tried to a jury. There is no evidence that Congress, in its 1948 streamlining of the Judicial Code, intended to overturn a century and a half of settled practice by authorizing appellate courts to review, under a weight-of-the-evidence standard, a trial judge's refusal to grant a new trial. As Judge Learned Hand observed several years later, under the 1948 Judicial Code such orders remain "not reviewable at all." *Portman v. American Home Products Corp.*, 201 F.2d 847, 848 (2d Cir. 1953).

A holding by this Court that appellate courts have jurisdiction (which they are required to exercise) to conduct weight-of-the-evidence review at the behest of disappointed litigants who seek a new trial would "oblige[] a reviewing court to examine in some detail all of the evidence," a "burdensome" requirement that is not warranted "where a trial judge denies a 'weight of the evidence' challenge and leaves in place a jury verdict supported by legally sufficient evidence." *Stonewall Ins. Co. v. Asbestos Claims Mgmt. Corp.*, 1995 U.S. App. LEXIS 35230, *53 (2d Cir. Dec. 13, 1995) (Newman, J.). This practice has virtually no utility, because appellate courts almost never force a grant of a new trial on weight-of-the-evidence grounds. Indeed, we have uncovered only eight such grants nationwide in the past decade. Nevertheless, "[s]o long as the appellate courts hold open any possibility of reversal on this ground, they invite litigants to come to them in countless cases arguing about the weight of the evidence," burdening appellate courts "for no good purpose, considering how extraordinarily rare it is that there is ever a reversal on this ground." Charles Alan Wright, Arthur R. Miller and Mary Kay Kane, FEDERAL PRACTICE & PROCEDURE: CIVIL 2D § 2819, at 204 (2d ed. 1995) (hereinafter "Wright & Miller").

ARGUMENT

I. THE RE-EXAMINATION CLAUSE OF THE SEVENTH AMENDMENT BARS FEDERAL APPELLATE COURTS FROM ENGAGING IN *DE NOVO* OR WEIGHT-OF-THE-EVIDENCE REVIEW OF ANY FACT FOUND BY A JURY

In this case, the Court of Appeals applied a New York statute providing that an appellate court "shall determine that an award is excessive or inadequate if it deviates materially from what would be reasonable compensation." N.Y. Civ. Prac. L. & R. § 5501(c) (McKinney Supp. 1995). The statute was adopted in 1986 in order to "relax the former standard of review and to facilitate appellate changes in verdicts." *O'Connor v. Graziosi*, 131 A.D.2d 553, 554, 516 N.Y.S.2d 276, 277 (2d Dept.), *appeal denied*, 70 N.Y.2d 613 (1987). In reviewing damage awards, New York appellate courts independently review the entire trial record and determine for themselves what would be "reasonable compensation" and whether

the jury's award "deviates materially" from it.[2] *See Consorti v. Armstrong World Industries, Inc.*, 72 F.3d 1003, 1013 & n.10 (2d Cir. 1995) (explaining difference between New York and federal standards of review).

Amici do not address the question of whether the Court of Appeals' decision to apply the New York statute is consistent with the principles of *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938). Even if the decision below were unobjectionable on *Erie* grounds, it would nonetheless run afoul of the Seventh Amendment. *See Slocum v. New York Life Ins. Co.*, 228 U.S. 364, 376-77 (1913) (federal courts may not apply state statutes in violation of Seventh Amendment which, "although not applicable to proceedings in the courts of the several States, is controlling in the Federal courts").

The Re-Examination Clause of the Seventh Amendment provides that "no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law." More than a century and a half ago, Justice Story wrote that the Re-Examination Clause is a "substantial and independent clause" that is in fact "more important" than the preceding portion of the Amendment. *Parsons v. Bedford*, 28 U.S. (3 Pet.) 433, 447 (1830). The Re-Examination Clause is a prohibition on "the indirect impairment of the right of trial by jury through judicial re-examination of factfindings of a jury other than as permitted in 1791." *Colgrove v. Battin*, 413 U.S. 149, 152 n.6 (1973).

The Seventh Amendment does not permit federal appellate courts to re-examine facts found by juries on a *de novo*, "weight-of-the-evidence," "thirteenth juror," or any similar basis. The Court of Appeals' approach flies in the face of two centuries of precedent in this Court; English practice at common law; and both the plain language and the principal purpose of the Seventh Amendment.

---

[2] *See, e.g., Pasquale v. Miller*, 194 A.D.2d 597, 598, 599 N.Y.S.2d 58, 60 (2d Dept. 1993) (recomputing award based on court's "find[ings]" with respect to "the nature of [the plaintiff's] illness, the extent to which she was able to return to her normal activities following her hospitalization, and the evidence regarding any lingering effects of the illness"); *Kirschhoffer v. Van Dyke*, 173 A.D.2d 7, 10-11, 577 N.Y.S.2d 512, 514-15 (2d Dept. 1991) (concluding, "after carefully reviewing the entire record," that "the verdict deviates materially from what would be reasonable compensation"); *Jurgen v. Linesburgh*, 159 A.D.2d 689, 690, 553 N.Y.S.2d 438, 439 (2d Dept. 1990) (reducing award based on appellate court's "review of the record" and its "find[ings]").

A. At Least 20 Decisions of This Court Have Relied on the Seventh Amendment to Bar *De Novo* or Weight-of-the-Evidence Review by Federal Appellate Courts

"It is the jury, not the court, which is the fact-finding body. It weighs the contradictory evidence and inferences, judges the credibility of witnesses, receives expert instructions, and draws the ultimate conclusion as to the facts. The very essence of its function is to select from among conflicting inferences and conclusions that which it considers most reasonable." *Tennant v. Peoria & Pekin Union Ry.*, 321 U.S. 29, 35 (1944). Thus, from its earliest decisions addressing the issue, this Court has uniformly held that the Seventh Amendment prohibits federal appellate courts from reviewing on a *de novo* or weight-of-the-evidence basis *any* finding of fact made by a jury and approved by the trial court. In *Parsons v. Bedford*, Justice Story held that a trial court did not err in refusing to transcribe testimony, which the petitioner sought "in order to establish the error of the verdict in matters of fact." 28 U.S. (3 Pet.) at 445. Justice Story explained that the application was immaterial because the Re-Examination Clause of the Seventh Amendment prohibited appellate review of such factual questions. *Id.* at 446-48.[3]

---

[3] *See also Hansen v. Boyd*, 161 U.S. 397, 402 (1896) ("ask[ing] us to determine the weight of proof" would "usurp the province of the jury"); *Aetna Life Ins. Co. v. Ward*, 140 U.S. 76, 91 (1891) ("We have no concern with questions of fact, or the weight to be given to the evidence which was properly admitted."); *Kennon v. Gilmer*, 131 U.S. 22, 29 (1889) ("this court has no authority to pass upon any question of fact involved in the consideration of the motion for a new trial"); *Insurance Co. v. Folsom*, 85 U.S. (18 Wall.) 237, 248-49 (1873) ("Facts found by a jury could only be re-examined under the rules of the common law . . . . Nothing, therefore, is open to re-examination in this case."); *Barreda v. Silsbee*, 62 U.S. (21 How.) 146, 166 (1858) ("Whether the jury were warranted in so finding or not, is not a question for an appellate tribunal. That question cannot be re-examined by this court."); *United States v. Laub*, 37 U.S. (12 Pet.) 1, 5 (1838) (deeming it "a point too well settled, to be now drawn into question, that the effect and sufficiency of the evidence, are for the consideration and determination of the jury; and the error is to be redressed, if at all, by application to the court below for a new trial"); *Marine Ins. Co. of Alexandria v. Young*, 9 U.S. (5 Cranch) 187, 191 (1809) ("it would be improper" for an appellate court to review a denial of a new trial "upon the ground that the verdict was contrary to evidence").

In *Railroad Co. v. Fraloff*, 100 U.S. 24 (1879), this Court first addressed the specific question of whether an allegedly excessive verdict was reviewable on appeal where there was no issue of faulty instructions or other trial error. Justice Harlan explained that appellate review was unavailable:

> [T]his court cannot reverse the judgment because, upon examination of the evidence, we may be of the opinion that the jury should have returned a verdict for a less amount. . . . Whether [the trial court's] action, in that particular, was erroneous or not, our power is restricted by *the Constitution* to the determination of the questions of law arising upon the record. Our authority does not extend to a re-examination of facts which have been tried by the jury under instructions correctly defining the legal rights of parties.

Id. at 31-32 (emphasis added). This Court has repeatedly reaffirmed the rule that "a case of mere excess upon the evidence is a matter to be dealt with by the trial court" and "does not present a question for reexamination" in an appellate court. *Southern Ry. Co. v. Bennett*, 233 U.S. 80, 87 (1914) (Holmes, J.).[4]

---

[4] *See also Dimick v. Schiedt*, 293 U.S. 474, 489 (1935) (Stone, J., dissenting) (referring to the rule "of the common law, long accepted in the federal courts, that the exercise of judicial discretion in denying a motion for a new trial, on the ground that the verdict is too small or too large, is not subject to review on writ of error or appeal. . . . This is but a special application of the more general rule that an appellate court will not reexamine the facts which induced the trial court to grant or deny a new trial."); *St. Louis, Iron Mountain & S. Ry. v. Craft*, 237 U.S. 648, 661 (1915) (excessiveness challenge "involves only a question of fact and is not open to reconsideration here"); *Texas & Pac. Ry. Co. v. Hill*, 237 U.S. 208, 215 (1915) ("the contention that error was committed by the trial court in not directing a remittitur because of the assumed excessive amount of the verdict is not open" to review); *Herencia v. Guzman*, 219 U.S. 44, 45 (1910) ("As there was evidence proper for the consideration of the jury the objection that the verdict was against the weight of evidence or that the damages allowed were excessive cannot be considered."); *Lincoln v. Power*, 151 U.S. 436, 437 (1894) (rejecting excessiveness challenge because "it is not permitted for this court, sitting as a court of errors, in a case wherein damages have been fixed by the verdict of a jury, to take notice of an assignment of this character, where the complaint is only of the action of the jury"); *New York, Lake Erie & W.R.R. v. Winter's Adm'r*, 143 U.S. 60, 75 (1892) ("Whether the verdict was excessive, is

Writing for the Court in *Fairmount Glass Works v. Cub Fork Coal Co.*, 287 U.S. 474 (1933), Justice Brandeis declared that "[t]he rule that this Court will not review the action of a federal trial court in granting or denying a motion for a new trial for error of fact has been settled by *a long and unbroken line of decisions*; and has been frequently applied where the ground of the motion was that the damages awarded by the jury were excessive or were inadequate. The rule precludes likewise a review of such action by a circuit court of appeals." *Id.* at 481 (emphasis added; footnotes omitted). In 1940, this Court observed that, "[c]ertainly, denial of a motion for a new trial on the grounds that the verdict was against the weight of the evidence would not be subject to review." *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 248 (1940). As late as 1954, this Court stated that "[a]ppellate review in the federal courts is, of course, limited ultimately by the Seventh Amendment." *Lumberman's Mut. Cas. Co. v. Elbert*, 348 U.S. 48, 53 n.5 (1954).

The practice in question is not inherently pro-plaintiff. *See, e.g., Fairmount Glass Works*, 287 U.S. at 485 (refusing to award a new trial to a plaintiff who was awarded only $1 in damages for a breach of contract worth more than $32,000). Rather, the rule derives from fundamental constitutional principles. Thus, many of this Court's decisions have expressly relied on the Seventh Amendment. *E.g., Fairmount Glass Works*, 287 U.S. at 482; *Metropolitan R.R. v. Moore*, 121 U.S. 558, 573 (1887); *Fraloff*, 100 U.S. at 31; *Lincoln v. Power*, 151 U.S. 436, 437-38 (1894); *Folsom*, 85 U.S. at 248-49; *Silsbee*, 62

---

not our province to determine on this writ of error. The correction of that error, if there were any, lay with the court below upon a motion for a new trial, the granting or refusal of which is not assignable for error here."); *Wilson v. Everett*, 139 U.S. 616, 621 (1891) (rejecting excessiveness claim because "this was a question to be reached only through a motion for a new trial; and we cannot, on this writ of error, review any error committed in that respect by the jury, if there were one. Nor can we take cognizance of the complaint that the court overruled the motion for a new trial . . . . The case was fairly submitted to the jury, and the issues involved were passed upon by them."); *Wabash Ry. v. McDaniels*, 107 U.S. 454, 456 (1883) ("That we are without authority to disturb the judgment upon the ground that the damages are excessive cannot be doubted. Whether the order of overruling the motion for the new trial based upon that ground was erroneous or not, our power is restricted to the determination of questions of law arising upon the record.").

U.S. at 166. Other decisions have relied on precedent which in turn was premised on the Seventh Amendment.[5]

Until relatively recently in the history of federal judicial practice, the lower federal courts similarly understood "that the power to set aside a verdict as against the weight of the evidence 'belongs exclusively to the trial judge,' whose action on a motion of this kind 'is not the subject of review,' and that the appellate court is 'without power' to order a new trial on this ground." *See* Wright & Miller, *supra*, § 2819, at 199 (footnotes omitted). Judge Learned Hand explained that "[a] motion for a new trial, though very ancient, was never regarded as part of the bill [of exceptions], but rather as an independent method of review, and there was no review of that review." *Miller v. Maryland Cas. Co.*, 40 F.2d 463, 464 (2d Cir. 1930) (citation omitted). In 1953, Judge Hand again stated that the "rule is too well established to justify discussion" that "there may be errors that are not reviewable at all, and among those that are not are erroneous orders granting or denying motions to set aside verdicts on the ground that they are against the weight of the evidence." *Portman*, 201 F.2d at 848.[6]

The change in the practice of the federal courts of appeals came after the revision and recodification of the Judicial Code in 1948, which omitted the explicit statutory ban on reversals "for any error in

---

[5] *E.g., Craft*, 237 U.S. at 661 (citing *Fraloff*); *McDaniels*, 107 U.S. at 456 (same), *Southern Ry. v. Bennett*, 233 U.S. at 87 (citing *Lincoln*); *Herencia*, 219 U.S. at 45 (same); *Waters-Pierce Oil Co. v. Deselms*, 212 U.S. 159, 181 (1909) (same); *Texas & Pac. Ry. Co. v. Behymer*, 189 U.S. 468, 469 (1903) (same); *Arkansas Valley Land & Cattle Co. v. Mann*, 130 U.S. 69, 75 (1889) (citing *Parsons*, *Folsom*, and *Fraloff*).

[6] *See also Pariser v. City of New York*, 146 F.2d 431, 433-34 (2d Cir. 1945) ("If the amount of the verdict be regarded as in fact excessive, nevertheless it was the jury's estimate arrived at after a proper charge. Such a matter is not reviewable on appeal . . . .") (Augustus N. Hand, J.); *Williamson v. Osenton*, 220 F. 653, 655 (4th Cir. 1915) ("this court cannot review the action of the District Court in refusing to grant a new trial for excess in the verdict. The provision of the seventh amendment of the Constitution that 'no fact once tried by a jury shall be otherwise reexamin[ed] in any court of the United States, than according to the rules of the common law,' was held in *Parsons v. Bedford*, 3 Pet. 433, to deny to a federal appellate court that power.").

fact" that had existed since 1789. See pp. 17-18, 23, *infra*. Erroneously believing that this revision and recodification was intended to work a radical (and constitutionally problematic) alteration in federal appellate practice, courts of appeals gradually began to assert the authority to grant a new trial, or a remittitur, on grounds of excessiveness. *See, e.g., Dagnello v. Long Island R.R.*, 289 F.2d 797, 800 (2d Cir. 1961). This Court spurred this unfortunate trend in *Affolder v. New York, C. & St. L. R.R.*, 339 U.S. 96, 101 (1950), with the gratuitous dictum: "We agree with the Court of Appeals that the amount of damages awarded by the District Court's judgment is not monstrous in the circumstances of this case" — even though the defendant had not claimed that the damages were excessive.

Since then, the courts of appeals have interpreted *Affolder* as implicitly authorizing appellate review of the weight of the evidence under an abuse-of-discretion standard. This expansion of appellate power was not without criticism. Early on, then-Judge Blackmun expressed strong constitutional reservations about the authority of appellate courts to review the denial of new trial motions raising excessiveness objections. *Solomon Dehydrating Co. v. Guyton*, 294 F.2d 439, 446-48 & n.3 (8th Cir. 1961), *cert. denied*, 368 U.S. 929 (1961). The Eighth Circuit has continued to question whether such authority exists,[7] as has the Second Circuit, which recently reiterated that denial of a new trial motion "is one of those few rulings that is simply unavailable for appellate review." *Stonewall Ins. Co.*, 1995 U.S. App. LEXIS 35230 at *53 (citing *Portman*, 201 F.2d at 848).[8]

This Court has on three separate occasions pointedly declined to authorize the lower courts' assertion of weight-of-the-evidence appellate review. This Court granted *certiorari* in *Neese v. Southern Ry.*, 350 U.S. 77 (1955) (per curiam), to review a Fourth Circuit

---

[7] *See Green v. American Airlines, Inc.*, 804 F.2d 453, 455 (8th Cir. 1986); *see also Thongvanh v. Thalacker*, 17 F.3d 256, 259-60 (8th Cir. 1994); *Czajka v. Black*, 901 F.2d 1484, 1485 (8th Cir. 1990); *Chohlis v. Cessna Aircraft Co.*, 760 F.2d 901, 906 (8th Cir. 1985).

[8] *See also Schwartz v. Capital Liquidators, Inc.*, 984 F.2d 53, 54 (2d Cir. 1993); *Dunlap-McCuller v. Riese Organization*, 980 F.2d 153, 157 (2d Cir. 1992), *cert. denied*, 114 S.Ct. 290 (1993); *Newmont Mines Ltd. v. Hanover Ins. Co.*, 784 F.2d 127, 133 (2d Cir. 1986); *Compton v. Luckenbach Overseas Corp.*, 425 F.2d 1130, 1132 (2d Cir.), *cert. denied*, 400 U.S. 916 (1970).

decision granting a new trial on the ground that the damages were excessive. But this Court did not decide the constitutional authority for the appellate court's action; instead, it held merely that the trial judge's decision sustaining the jury verdict had sufficient "support in the record." *Id.* at 77; *see also id.* ("We reverse the judgment of the Court of Appeals without reaching the constitutional challenge to that court's jurisdiction to review the denial by the trial court of a motion for a new trial on the ground that the verdict was excessive.").

A decade later, in *Grunenthal v. Long Island R.R.*, 393 U.S. 156 (1968), this Court granted *certiorari* to review the question "[w]hether a Court of Appeals may constitutionally review the exercise of discretion by a District Judge in refusing to set aside a verdict for excessiveness." Pet. Br. in No. 67-35, at 2. Once again, however, this Court did not reach the constitutional question, holding that the trial court had not erred in sustaining the original jury verdict. *See* 393 U.S. at 160-62.

More recently, in *Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257 (1989), this Court pointedly observed that "[w]e have never held expressly that the Seventh Amendment allows appellate review of a district court's denial of a motion to set aside an award as excessive. Although we granted certiorari in two cases in order to consider the issue, in both instances we found it unnecessary to reach the question when we decided the case." *Id.* at 279 n.25. This Court proceeded to stress that "federal courts operate under the strictures of the Seventh Amendment. As a result, we are reluctant to stray too far from traditional common-law standards, or to take steps which ultimately might interfere with the proper role of the jury." *Id.* at 280 n.26.

The modern-day development of the practice of appellate weight-of-the-evidence review thus lends no support to its legitimacy. Moreover, as Justice Kennedy has commented in another context, "it has never been the rule that federal courts . . . acquire power by adverse possession," *Newman-Green, Inc. v. Alfonzo-Larrain*, 490 U.S. 826, 839 (1989) (dissenting opinion) — especially where, as here, the historical evidence clearly indicates the limited nature of federal judicial authority.

B. The Historical Evidence Strongly Supports This Court's Prior Decisions

"It is extremely difficult to reconcile appellate review, under any circumstances, of the denial of . . . new trial motions with the Seventh Amendment, which prohibits reexamination of any 'fact tried by jury . . . [other] than according to the rules of the common law.'" Wright & Miller, *supra*, § 2819, at 202; *see also* Charles Alan Wright, LAW OF THE FEDERAL COURTS § 95, at 681-82 (5th ed. 1994).[9]

1. *English common-law practice*

Under the Re-Examination Clause, "when a trial by jury has been had in an action at law, . . . the facts there tried and decided cannot be reexamined in any court of the United States, otherwise than according to the rules of the common law of England." *Capital Traction Co. v. Hof*, 174 U.S. 1, 13 (1899).

In 18th century England, there were three common-law courts of record having original jurisdiction: the King's Bench, the Exchequer, and the Court of Common Pleas. The Exchequer was the court in which the King collected revenue. J.H. Baker, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 56 (3d ed. 1990). The King's Bench was held "'before the lord king wheresoever he should be in England' . . . and was therefore excluded from hearing 'common pleas.'" *Id.* at 45. Common pleas for this purpose were all suits in which the king had no interest and composed the vast majority of the civil common law.

Although all three courts sat at Westminster, actions were rarely tried there. Rather, under the *nisi prius* system, judges from all courts would ride circuit and try cases in the local counties. W.R. Cornish & G. de N. Clark, LAW AND SOCIETY IN ENGLAND 1750-1950, at 23 (1989); G.R.Y. Radcliffe & Geoffrey Cross, THE ENGLISH LEGAL

[9] The rule is different where the district court has granted a new trial. *See* Wright & Miller, *supra*, § 2819, at 205 ("There is no Seventh Amendment problem, however, if the appellate court reverses the trial court's grant of a new trial. In this instance the appellate court is not reexamining facts found by a jury but is reinstating the jury's findings as against the contrary findings of the judge. Appellate action in this context protects the role of the jury, as envisioned by the Seventh Amendment, rather than running contrary to it.").

SYSTEM 90, 183-84 (3d ed. 1954). Most cases were tried in the litigants' county, rather than at Westminster. The verdicts were returned to Westminster, where they were entered by the full court. Radcliffe & Cross, *supra*, at 91, 186.

The system of post-trial review was restricted. At common law, an appeal and a motion for a new trial "were mutually exclusive remedies." *Fairmount Glass Works*, 287 U.S. at 482 n.9 (citations omitted). An appeal took the form of a "writ of error," which removed the case to a different and higher court[10] and was strictly confined to matters of law on the face of the record. Baker, *supra*, at 157; Radcliffe & Cross, *supra*, at 211; Cooley's BLACKSTONE 407, 411 (4th Am. ed. 1899); I W.S. Holdsworth, A HISTORY OF ENGLISH COMMON LAW 91 (2d ed. 1922). Historically, the writ of error searched only the record of process, pleadings, verdict, and judgment for error of law. Note, *Appealability of Rulings on Motion for New Trial in the Federal Court*, 98 U. PA. L. REV. 575, 575 (1950). Examples of error included "discrepancies between the amounts claimed and those awarded, irregularities in the panel of jurors, failure to notify parties of adjournments, and so on." A.K.R. Kiralfy, POTTER'S OUTLINES OF ENGLISH LEGAL HISTORY 68 (5th ed. 1958).

A motion for new trial, on the other hand, "was addressed to the discretion of the court in banc" at Westminster. *Fairmount Glass Works*, 287 U.S. at 482 n.9. It was made before judgment had been entered by the full court, and was not an appellate procedure. A motion for new trial was generally made on the fourth day of the next term to the full bench of the court from which the process originated. Such a motion followed the verdict, and judgment was not entered until the motion was denied. The procedure was informal, being based on the trial judge's information as supplied to his colleagues. The decision was final and subject to no further review as to factual matters. Radcliffe & Cross, *supra*, at 211-12 ("one could not appeal against a refusal of the court *in banc* to grant a new trial"); Cooley's

[10] The system of review was complicated by the fact that the same court might sit at different times in a trial or review capacity. Baker, *supra*, at 158; A.T. Carter, A HISTORY OF ENGLISH LEGAL INSTITUTIONS 88 (1986); Radcliffe & Cross, *supra*, at 212-13.

BLACKSTONE, *supra*, at 38-45, 57, 58, 391-392.[11]

The definitive point is that the motion was passed upon by the same court in which the action was begun and in which it was tried. Consideration of the motion was not a form of appellate review. *See* Baker, *supra*, at 159 (The power to grant a new trial was "exercised before judgment, and not by a court of appeal. Once the court in banc had given judgment, the only redress was of the limited kind provided by writ of error."); Kiralfy, *supra*, at 56 (*nisi prius* judge recorded the verdict, but judgment was entered at Westminster); *Moore*, 121 U.S. at 573 (noting similar practice in trial courts of District of Columbia).

In addition, at common law "no English court ever set aside . . . a verdict, except with the concurrence of the judge, or judges, who sat with the jury, saw the witnesses and heard them testify." Maxfield Weisbrod, Note, *Limitations on Trial By Jury In Illinois*, 19 CHI. KENT L. REV. 91, 92 (1940). Thus, "the verdict could be set aside only if the judge who had presided at the trial and heard the witnesses deemed the verdict to be unjustified and, even then, only if he could persuade his brethren at Westminster to this view." Wright & Miller, *supra*, § 2819, at 204.[12]

Moreover, the en banc court often refused to acquiesce in the trial judge's recommendation. Baker, *supra*, at 101. The court would not "order a new trial simply because it did not agree with the verdict. If there was no misdirection [of the jury] and there was some evidence on which the verdict could be supported, then it must stand." Radcliffe & Cross, *supra*, at 187; *see also Honda Motor Co. v. Oberg*, 114 S. Ct. 2331, 2336 (1994) (recognizing "the deference ordinarily afforded jury verdicts" at common law and in early American courts).

---

[11] In 1854, the Common Law Procedure Act allowed the Exchequer Chamber to review a refusal to grant a new trial in a limited class of cases, but it maintained an important restriction: "'where the application for a new trial is upon Matter of Discretion only, as on the ground that the Verdict was against the Weight of Evidence or otherwise, no such Appeal shall be allowed.'" *Fairmount Glass Works*, 287 U.S. at 482 n.9.

[12] *See also* John Marshall Mitnick, *From Neighbor-Witness to Judge of Proofs: The Transformation of the English Civil Juror*, 32 AM. J. LEGAL HIST. 201, 213 (1988) (explaining that the King's Bench held that a "new trial would not be granted unless the *nisi prius* judge certified *in writing* that the verdict was against evidence") (emphasis in original).

In short, there was no factual appellate review at common law. "To allow appellate review of the denial of the new-trial motion would mean that the verdict could be set aside solely by judges who were not present at the trial even though the trial judge has found that the verdict is not against the clear weight of the evidence. This would be a complete reversal of common-law practice and is very difficult to reconcile with the Seventh Amendment." Wright & Miller, *supra*, § 2819, at 204; *see also* Wright, LAW OF FEDERAL COURTS, *supra*, § 95, at 681-82.

2. *The genesis of the Seventh Amendment*

The Seventh Amendment was deliberately adopted to protect the jury's fact-finding prerogative against appellate review. The interference with the colonists' right to jury trial had been "one of the important grievances leading to the break with England." *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 340 (1979) (Rehnquist, now C.J., dissenting). Among the colonists' complaints were the extension of the jurisdiction of the reorganized courts of admiralty and vice-admiralty and the assertion of appellate review by the Privy Council in London, which claimed the authority to disallow acts of colonial legislatures and overturn verdicts of colonial juries and judgments of colonial courts. 1 Homer Carey Hockett, THE CONSTITUTIONAL HISTORY OF THE UNITED STATES 55 (1939) (Council reviewed some 265 colonial cases). The colonists found this practice "expensive, dilatory, and vexatious." Roscoe Pound, THE DEVELOPMENT OF CONSTITUTIONAL GUARANTEES OF LIBERTY 77 (1957). The Council rejected attempts by the colonies to preserve the finality of their own judicial judgments. Colonial legislatures sought to bar review altogether, limit the time for appeals to the Privy Council, or limit the cases in which they might be brought. *See* Hockett, *supra*, at 54; Pound, *supra*, at 77. The Privy Council disregarded such attempts, reviewing some 50 cases on petition after colonial courts had refused to grant leave to appeal. *See* Hockett, *supra*, at 55 n.12. Such arbitrary review contributed to the colonists' belief that they were the victims of a remote, "centralized administration at Westminster which continually neglected or even positively injured [their] interests." *Id.* at 71; *see also* Bernard Bailyn, THE ORIGINS OF AMERICAN POLITICS 67-70 (1968).

This experience was not forgotten during the framing of the Constitution. "Geography preoccupied the founding generation." Akhil Reed Amar, *Marbury, Section 13, and the Original Jurisdiction of the Supreme Court*, 56 U. CHI. L. REV. 443, 469 (1989). None other than John Marshall raised the spectre of "being dragged to the centre of the United States" to a faraway court.[13] *See also* U.S. Const., art. III, § 2, cl. 2 (suits against Ambassadors must be brought in centrally located Supreme Court); *id.* at art. III, § 2, cl. 3 and amend. VI (criminal trials must be in local venues). George Mason remarked: "Perhaps I have a respectable witness who saw me pay the money; but I must carry him one thousand miles to prove it, or be compelled to pay it again."[14] Not surprisingly, the framers expressed a strong "preference for local juries, who would be more familiar with the parties and witnesses, and thus in a better position to assess their credibility and character. . . . [A]ppellate review was generally not seen as authorizing a 'new trial' by the appellate judges." Amar, *supra*, at 472-73 (footnote omitted).[15] Indeed, "the right to a jury trial and the corresponding limitation on appellate courts' review of fact were foremost in the minds of the Framers." J. Wilson Parker, *Free Expression and the Function of the Jury*, 65 B.U. L. REV. 483, 498 (1985).

As initially proposed to the States, the Constitution provided in Art. III, § 2, cl. 2 that "the supreme Court shall have appellate Jurisdiction, both as to Law and Fact," and it contained no bill of rights. The antifederalists contended that this power would invade the

---

[13] Jonathan Elliot, 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 552-53 (1836) ("ELLIOT'S DEBATES").

[14] 3 ELLIOT'S DEBATES at 526.

[15] For further discussions of the importance with which the framers treated the issue of geography, *see* Akhil Reed Amar and Vikram David Amar, *Is the Presidential Succession Law Constitutional?*, 48 STAN. L. REV. 113, 125 (1995) (noting framers' "obsess[ion]" with geographic concerns); Akhil Reed Amar, *Article III and the Judiciary Act of 1789*, 138 U. PA. L. REV. 1499, 1560 (1990) ("one of the biggest differences between Supreme Court and lower federal court judges is geographic").

jury's domain.[16] Federalists such as Hamilton assured skeptics that the extension of "appellate jurisdiction" to "matters of fact" would not work "an implied supersedure of the trial by jury." THE FEDERALIST NO. 83, at 509 (H. Lodge ed. 1888).

The outcome of the debate was that "on the matter of civil jury trial the antifederalists won." Charles Wolfram, *The Constitutional History of the Seventh Amendment*, 57 MINN. L. REV. 639, 672 (1973). Restrictions on appellate review were inserted into the Judiciary Act of 1789, which provided in Section 17 that new trials could be granted only "for reasons for which new trials have usually been granted in the courts of law." 1 Stat. 83. Furthermore, Section 22 provided that there should be "no reversal in either (circuit or Supreme) court on such writ of error . . . for any error in fact." 1 Stat. 84-85.

The same concerns were manifested in the Seventh Amendment. "[T]he entire issue of the absence of a bill of rights was precipitated at the Philadelphia Convention by an objection that the document under consideration lacked a specific guarantee of jury trial in civil cases." Wolfram, *supra*, 57 MINN. L. REV. at 657. The Re-Examination Clause was inserted into the Seventh Amendment specifically in order to address the "vexing question of appellate review of questions of fact." *Id.* at 727. As this Court observed in *The Justices v. Murray*, 76 U.S. 274 (1870), the Seventh Amendment was adopted mainly due to "the apprehension and alarm in respect to the *appellate jurisdiction* of this court over cases tried by a jury." *Id.* at 281 (emphasis added). *See also* Higginbotham, *supra*, 56 TEX. L. REV. at 49-50, 58, 60.

---

[16] Patrick Henry warned that the Constitution would alter the existing practice whereby "[n]o appeal can now be made as to fact in common law suits. The unanimous verdict of impartial men cannot be reversed." 3 ELLIOTT'S DEBATES at 544. William Grayson cautioned:

> I lay it down as a principle, that trial by jury is given up to the discretion of congress. If they take it away, will it be a breach of this constitution? I apprehend not; for as they have an absolute appellate jurisdiction of facts, they may alter them as they may think proper.

Id. at 568; *see also* Pittman, *Jasper Yeate's Notes on the Pennsylvania Ratifying Convention*, 22 W. & Mary Q. 301, 311 (1965) ("Jury Trials may be superseded in Civil Cases[.] Appellate Jurisdiction is a Civil Law Term[.] There can be no Appeal after Jury Trials. I fear there is an Intention to substitute the Civil Law and the Room of the Common Law[.]").

Those on the scene near the time of the Seventh Amendment's framing — who were also familiar with English practice — understood it as foreclosing weight-of-the-evidence appellate review. Justice Story, for example, commented that "[t]he only modes known to the common law to re-examine such facts [found by a jury], are the granting of a new trial by the court where the issue was tried, or to which the record was properly returnable; or the award of a [new trial], by an appellate court, for some error of law which intervened in the proceedings." *Parsons*, 28 U.S. at 448. The Seventh Amendment "is a prohibition to the courts of the United States to reexamine any facts tried by a jury in any other manner." *Id.* at 447-48.

C. The Asserted Justifications for Weight-of-the-Evidence Appellate Review are Demonstrably Inadequate

1. The Judiciary Act of 1789 gave federal circuit courts authority to review the final decisions of the district courts in civil cases only on writ of error and prohibited reversals for errors of fact. 1 Stat. 84-85. As commonly understood, this procedural device was concerned only with errors of law apparent on the face of the record. *E.g.*, E.W. Sutherland, *The Problem of Appellate Review*, 5 TEX. L. REV. 126, 142 (1927). It has been argued that Congress's elimination of the writ of error procedure early in this century and other statutory changes authorize federal appellate courts to engage in weight-of-the-evidence review. However, even if Congress intended to give the federal appellate courts this power (which it did not, see pp. 22-24, *infra*), the Seventh Amendment prohibited it from doing so.

The previous restrictions on appellate review were not simply a reflection of the writ of error system: they flowed directly from the Seventh Amendment, which provides an even more basic limitation on federal court jurisdiction. Thus, even before the writ of error procedure was eliminated, the record before the appellate court had been enlarged to include in the bill of exceptions a motion for a new trial — yet this Court continued to hold that appellate review of factual issues was unavailable. *See, e.g.*, *Fairmount Glass Works*, 287 U.S. at 482 (specifically noting that the writ of error was not a basis for the denial of review).

2. It is also sometimes suggested that an appellate court, in considering whether the trial court has abused its discretion, is passing

on a question of law rather than a question of fact. However, such an argument is utterly flawed, because it is "so purely verbal, and its implications for the Seventh Amendment so plainly devastating . . . . If a jury finds defendant negligent and the appellate court decides that the clear weight of the evidence shows defendant to be free from negligence, it has reexamined the jury's fact determination." Wright & Miller, *supra*, § 2819, at 202-03.[17] Thus, in *Fairmount Glass Works*, 287 U.S. at 485, this Court declined to adopt the theory that "the refusal to set aside the verdict was an abuse of the trial court's discretion, and hence reviewable." Judge Learned Hand, in *Miller v. Maryland Cas. Co.*, 40 F.2d 463, 465 (2d Cir. 1930), disapproved as impracticable the suggestion that federal appellate courts have the power to review for errors of fact the question of alleged excessiveness of damages by the "scholastic refinement" of calling the review one for "abuse of discretion."

This Court has repeatedly held that the question of the adequacy of the evidence to support a damage award is "purely a question of fact," not a legal issue. *Moore*, 121 U.S. at 574; *see also St. Louis, Iron Mountain & S. Ry. v. Craft*, 237 U.S. 648, 661 (1915). Weight-of-the-evidence review simply gives an appellate court the opportunity to substitute *its* view of the evidence for that of the jury, not to correct any kind of defect in the proceeding. By definition, the award is one that a rational jury could reasonably have imposed; its only "flaw" is that a federal appellate court disagrees with it.

Appellate courts do have the power to order a new trial on the basis of improper instructions, erroneous admission of evidence, inflammatory closing argument, or other legal error infecting a trial, but there is a world of difference between a legally incorrect *input* that taints a jury's verdict and an *output* that is "tainted" only by a federal court's after-the-fact assessment that the verdict is against the weight of the evidence. Indeed, the same reasoning that purports to justify appellate review for excessiveness could be used to rationalize any

---

[17] *See also* William Blume, *Review of Fact in Jury Cases — The Seventh Amendment*, 20 J. AM. JUD. SOC. 130, 131 (1936) ("[I]t cannot be said that the question presented is a question of law. In deciding whether a jury found against the weight of the evidence, the trial judge must weigh the evidence and decide the facts. In reviewing his decision the appellate court is reviewing the case on the facts.").

kind of re-examination of a jury's factfinding — leading to the complete evisceration of the second Clause of the Seventh Amendment.[18]

3. This case presents no issue of whether federal appellate courts have the power to review the arguably legal question of a damage award's compliance with the substantive due process "reasonableness" standard. *See Oberg*, 114 S. Ct. at 2339, 2341 n.10, 2342 (referring variously to whether there is "evidence providing at least a rational basis for the particular deprivation of property," whether the award is "arbitrary," and similar formulations). The Court of Appeals did not apply such a standard, but rather employed a far-reaching weight-of-the-evidence or even *de novo* approach.[19]

Nonetheless, it is worth noting that there could be no Fifth Amendment due process right to appellate review even under a substantive due process standard, because the longstanding rule is that there is no right to appellate review *at all*, even in criminal cases.[20] In

---

[18] Transforming issues of "fact" into "law" is "drastic in that it amounts to a direct judicial assault on the prerogatives of fact finders." Martin B. Louis, *Allocating Adjudicative Decision Making Authority Between the Trial and Appellate Levels: A Unified View of the Scope of Review, the Judge/Jury Question, and Procedural Discretion*, 64 N.C. L. REV. 993, 1018 (1986). The "classification of ultimate facts as questions of law amounts to a manipulation of the law-fact doctrine to take questions from the jury or to subject the trial level's resolution of questions to free appellate review." *Id.* at 1028.

[19] *See Southern Ry. v. Bennett*, 233 U.S. 80, 87 (1914) (Holmes, J.) ("It may be admitted that if it were true that the excess appeared as matter of law; that if, for instance, the statute fixed a maximum and the verdict exceeded it, a question might arise for this court. But a case of mere excess upon the evidence is a matter to be dealt with by the trial court.").

[20] *See, e.g., Pennsylvania v. Finley*, 481 U.S. 551, 555-58 (1987); *Abney v. United States*, 431 U.S. 651, 656 (1977); *District of Columbia v. Clawans*, 300 U.S. 617, 627 (1937); *McKane v. Durston*, 153 U.S. 684, 687 (1894). Moreover, it is instructive that this Court originally held that the Seventh Amendment prevented *any* federal court — even a trial court — from granting judgment as a matter of law to the losing party after a jury's verdict, even when there was no legally sufficient evidence to support the verdict. *Slocum v. New York Life Ins. Co.*, 228 U.S. 364 (1913). Such a result was not thought to violate due process,

addition, *Oberg* concerned the Due Process Clause of the Fourteenth Amendment (not the Fifth Amendment). This Court acknowledged that "[j]udicial deference to jury verdicts may have been stronger in 18th century America than in England, and judges' power to order new trials for excessive damages more contested." 114 S. Ct. at 2342 n.12. Indeed, "it was widely believed in late eighteenth-century America that the jury, when rendering a general verdict, could take upon itself to decide both law and fact." Akhil Reed Amar, *The Bill of Rights As a Constitution*, 100 YALE L.J. 1131, 1193 (1991).[21]

---

and not until the fiction was developed of submitting the case to the jury while reserving a directed verdict motion did the Court hold that post-trial grant of judgment as a matter of law could be permissible under the Seventh Amendment. *Baltimore & Carolina Line, Inc. v. Redman*, 295 U.S. 654, 657 (1935).

[21] For example, Chief Justice John Jay, in conducting a civil trial in which a State was a party, instructed a jury that it had the authority "to determine the law as well as the fact in controversy." *Georgia v. Brailsford*, 3 U.S. (3 Dall.) 1, 4 (1794). *See also Bingham v. Cabot*, 3 U.S. (3 Dall.) 19, 33 (1795) (Iredell, J.) (explaining in civil case that "though the jury will generally respect the sentiments of the court on points of law, they are not bound to deliver a verdict conformably to them"); Robert E. Riggs, *Constitutionalizing Punitive Damages: The Limits of Due Process*, 52 OHIO ST. L. REV. 859, 899-900 (1991) ("At the time the Fifth Amendment was adopted, juries in America, 'unlike juries today, usually possessed the power to determine both law and fact.' . . . Although the practice of permitting juries to determine the law of the case has since been abandoned, the change occurred through common law development and legislative enactment — not because due process was thought to require it.") (citation omitted); Morton Horwitz, THE TRANSFORMATION OF AMERICAN LAW, 1780-1860, at 142 (1977) ("The award of new trials for any reason [was] regarded with profound suspicion by the revolutionary generation. 'The practice of granting new trials,' a Virginia judge noted in 1786, 'was not a favourite of the courts of England' until the elevation of Lord Mansfield, 'whose habit of controling juries does not accord with the free institutions of this country.'").

The colonists lionized the English defenders of the jury, like Lord Chief Justice Camden, who warned in *Huckle v. Money*, 95 Eng. Rep. 768, 769 (C.P. 1763) (denying motion for new trial in tort case), that "it is very dangerous for the Judges to intermeddle in damages for torts; it must be a glaring case indeed of outrageous damages in tort, and which all mankind at first blush must think so." *See* Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 772 & n.54 (1994) ("Witness, for example, Camden, New Jersey; Camden, South Carolina").

II. THE EXISTING JUDICIAL CODE SHOULD NOT BE CONSTRUED AS AUTHORIZING *DE NOVO* OR WEIGHT-OF-THE-EVIDENCE REVIEW BY FEDERAL APPELLATE COURTS

In light of the historical record at common law and the unbroken line of decisions of this Court which all support the conclusion that the Seventh Amendment does not permit appellate review of jury verdicts for weight of the evidence, it would be quite surprising if Congress nevertheless decided to authorize the federal appellate courts to engage in such review. An analysis of the relevant statutes reveals that Congress has not done so, and certainly has not done so with the unambiguous clarity that would be expected if the Legislature had intended to depart from the settled historical practice of non-review. Because of the general rule that "in a case of statutory ambiguity, 'where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress,'"[22] as well as the rule that grants of federal jurisdiction to the lower federal courts should be construed narrowly,

---

[22] *Concrete Pipe of Cal., Inc. v. Laborers Pension Tr.*, 113 S. Ct. 2264, 2282-83 (1993) (quoting *Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Construction Trades Council*, 485 U.S. 568, 575 (1988)). *See also Zobrest v. Catalina Foothills School Dist.*, 113 S. Ct. 2462, 2465-66 (1993); *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 499-501, 504 (1979); *Ashwander v. TVA*, 297 U.S. 288, 348 (1936) (Brandeis, J. concurring) (quoting *Crowell v. Benson*, 285 U.S. 22, 62 (1932)); *Blodgett v. Holden*, 275 U.S. 142, 148 (1927) (Holmes, J., concurring in result); *Hooper v. California*, 155 U.S. 648, 657 (1895).

This Court has often relied on this principle in an effort to avoid Seventh Amendment issues. *See, e.g., Tull v. United States*, 481 U.S. 412, 417 n.3 (1987); *Pernell v. Southall Realty*, 416 U.S. 363, 365-66 (1974); *Curtis v. Loether*, 415 U.S. 189, 191-92 & n.6 (1974). Indeed, when this Court first confronted the Seventh Amendment issue of whether federal appellate courts may review jury damage awards on grounds of excessiveness, during oral argument Chief Justice Warren requested supplemental briefing on whether the jurisdictional statutes could be construed to deny such review and thereby avoid this Seventh Amendment issue. *See* Supp. Reply Br. for Pet. in *Neese v. Southern Railway Co.*, No. 55-28, at 1. Ultimately, this Court chose to avoid both the constitutional and the statutory issues through a narrow ruling on the facts in *Neese*. *See* 350 U.S. at 77-78.

see, e.g., Healy v. Ratta, 292 U.S. 263, 270 (1934), at a minimum this Court should hold that the federal appellate courts lack the statutory authority to engage in weight-of-the-evidence review.

Simultaneous with its creation of the federal appellate judiciary, Congress adopted Section 22 of the Judiciary Act of 1789, which plainly barred any appellate review for weight of the evidence — reflecting a principle that was later incorporated into the Seventh Amendment. This limitation was in addition to the threshold limitation, inherent in Section 17 of the Judiciary Act, that federal courts were empowered to grant new trials only "for reasons for which new trials have usually been granted in the courts of law," 1 Stat. 83, a limitation which continues in Fed. R. Civ. P. 59(a).

Section 22 was expressly carried forward in all Judicial Codes promulgated until 1948; its last codification was at 28 U.S.C. § 879 (1940). This limitation on appellate review was explicitly retained in the Judicial Code for two decades after the writ of error procedure was eliminated in 1928 (*see* 45 Stat. 54, 466 (1928), 28 U.S.C. §§ 861a, 861b (1940)).

To be sure, the language of 28 U.S.C. § 879 (1940) (and originally of Section 22 of the Judiciary Act of 1789) mandating that there be "no reversal . . . for error in fact" did not survive the 1948 revision and recodification of the Judicial Code. Section 879 was recodified into present 28 U.S.C. § 2105, which retained language in Section 879 concerning the ban on reversal upon matters in abatement not involving jurisdiction, but omitted the flat ban on reversal for error in fact. However, under the special rule that this Court has followed for interpreting the 1948 Judicial Code, this omission cannot be read as making a substantive change in the longstanding practice against appellate review for weight of the evidence in jury cases — a practice that therefore still exists today.

In general, of course, "it will not be inferred that Congress, in revising and consolidating the laws, intended to change their effect unless such intention is clearly expressed." *Anderson v. Pacific Coast S.S. Co.*, 225 U.S. 187, 199 (1912). Applying this rule in its first case interpreting the 1948 revision of the Judicial Code, this Court held that "no changes of law or policy are to be presumed from changes of language in the revision unless an intent to make such changes is clearly expressed" in the Revisers' Notes, where each intended substantive change was "explained in detail." *Fourco Glass Co. v.*

Transmirra Prods. Corp., 353 U.S. 222, 226-28 & nn. 6-8 (1957). *See also Ankenbrandt v. Richards*, 504 U.S. 689, 700-01 (1992) (reaffirming and applying *Fourco Glass*); *Finley v. United States*, 490 U.S. 551, 554-55 (1989) (same).

There is nothing in the text of the 1948 Judicial Code, or in its legislative history, suggesting an intent suddenly to authorize appellate weight-of-the-evidence review in common-law cases tried to a jury. The Revisers' Note for new 28 U.S.C. § 2105 affirmatively makes clear that this was not the intent of the 1948 revision. The blanket reference to "no reversal . . . for error in fact" was dropped not to authorize appellate scrutiny of the weight of the evidence in jury cases, but *solely* "to avoid any construction that matters of fact are not reviewable in nonjury cases."[23] Thus, new Section 2105 simply resolved the tension that had existed between old Section 879 and Fed. R. Civ. P. 52(a) (authorizing appellate review of trial court findings under a "clearly erroneous" standard), which had taken effect a decade earlier. There is no indication, anywhere, of any intent by Congress to make any other change in the law.

Reading the 1948 Judicial Code as continuing the bar on appellate weight-of-the-evidence review of jury verdicts comports: (1) with the rule that statutes should be read if possible to avoid constitutional issues, (2) with the rule that grants of federal jurisdiction should be construed narrowly, and (3) with the rule that the 1948 revisions of the Judicial Code do not change the prior law absent a clear statement by Congress of its intent to do so. As an added virtue, it comports with a commonsense approach to the administration of justice by refusing

---

[23] The Revisers' Note (printed at the end of 28 U.S.C. § 2105) reads in full:

> The revised language is substituted for the provisions of section 879 of Title 28, U.S.C., 1040 ed., to avoid any construction that matters of fact are not reviewable in nonjury cases. Such section 879 related to review upon a writ of error which applied only to actions at law. (See Rule 52(a) of the Federal Rules of Civil Procedure limiting the review of questions of fact which renders unnecessary any statutory limitation.)
>
> Rule 7(c) of the Federal Rules of Civil Procedure abolished all pleas, and the rules adopted the motion as a substitute therefor.
>
> Words "matters in abatement" were, therefore, substituted for the abolished "plea to the jurisdiction."
>
> Changes were made in phraseology.

to attribute to Congress an intent to saddle the federal appellate courts with an enormously burdensome duty that has no significant utility and that would divert enormous resources from other, much more important duties that Congress clearly has vested in the federal appellate courts.

1. To put things in perspective, weight-of-the-evidence review is not needed at all, at any level, to provide basic fairness to litigants. Due process is satisfied where *one* trial of the facts has been held, uninfected by prejudicial legal error. *See Pittsburgh, Cincinnati & Chi. Ry. v. Backus*, 154 U.S. 421, 426-27 (1894) ("[a] hearing before judgment, with full opportunity to present all the evidence and arguments which the party deems important, is all that can be adjudged vital. Rehearings, new trials, are not essential to due process of law, either in judicial or administrative proceedings. One hearing, if ample, before judgment, satisfies the demand of the Constitution in this respect"); *Louisville and Nashville R.R. Co. v. Woodson*, 134 U.S. 614, 623 (1890) (even where the trial court "would have found a different verdict, because of the weakness of the evidence," due process is satisfied where "there was some evidence" in its support); *Wiscart v. D'Auchy*, 3 U.S. (3 Dall.) 321, 328 (1796) (Ellsworth, C.J.) ("Surely, it cannot be deemed a denial of justice, that a man shall not be permitted to try his cause two or three times over."). By definition, weight-of-the-evidence review occurs only *after* it has been determined that the jury's verdict is rational and supported by proper evidence, so that the result fully satisfies due process. *See Oberg*, 114 S. Ct. at 2341 n.10; *Jackson v. Virginia*, 443 U.S. 307, 323-24 (1979).

2. Assuming that weight-of-the-evidence review is allowed, it is difficult to see the point of having further review after the trial judge, who sat through the trial and saw all the witnesses, has decided that the jury's verdict is *not* against the weight of the evidence. As one leading scholar observed in another context, there is "the possibility of error inherent in any process," but the presumption should be "that if a job can be well done once, it should not be done twice." Paul M. Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441, 448, 451 (1963). Especially in this context, where no constitutional rights are at stake, if "one cannot demonstrate that relitigation would not merely consist of repetition and second-guessing, why should not the first proceeding 'count'?

Why should we duplicate effort?" *Id.* There should be "some reasoned institutional justification" for duplicating effort, not just "second-guessing merely for the sake of second-guessing, in the service of the illusory notion that if we only try hard enough we will find the 'truth'." *Id.*

Clearly, a second level of weight-of-the-evidence review cannot be justified on the theory that appellate judges are *better* at accurately assessing the weight of the evidence in a record. Given the careful selection system for federal trial judges, "it is hard to think of any reason why they are more likely to make errors of judgment than are appellate judges." Charles Alan Wright, *The Doubtful Omniscience of Appellate Courts*, 41 MINN. L. REV. 751, 781 (1957). On weight-of-the-evidence issues, appellate judges lack access to information that is critically relevant, and probably essential, to weighing the evidence accurately: "the trial judge has the vast advantage of having been present in the courtroom and heard the witnesses." *Id.* Thus, motions for a new trial "can be more satisfactorily dealt with by the judge who tried the cause, and who had the opportunity of seeing the witnesses and hearing them testify." *Moore*, 121 U.S. at 572-73. Indeed, the Court of Appeals confessed in this very case that "[r]emittitur always presents difficult problems for appellate courts. We review the evidence on a cold paper record, and we compare that record to prior decisions as to which we have only an incomplete knowledge of the facts. . . . In the end, it is not our job to impose a specific award of damages — that task is for the jury." Pet. App. 9a.

Especially given that trial judges are obviously more qualified than appellate judges to make an efficient and intelligent assessment of the record as a whole, allowing appellate judges to second-guess the trial judge on a cold record carries a further price: "lessened confidence in the trial judge." Wright, *supra*, 41 MINN. L. REV. at 782. There is "nothing more subversive of a judge's sense of responsibility, of the inner subjective conscientiousness which is so essential a part of the difficult and subtle art of judging well, than an indiscriminate acceptance of the notion that all the shots will always be called by someone else." Bator, *supra*, at 451.

3. Weight-of-the-evidence review by appellate courts has virtually no utility because "[a]ctual cases of reversal for this reason are extremely few." Wright & Miller, *supra*, § 2819, at 201 & n.11. An electronic search of all published decisions from all thirteen circuits

during the past decade turned up only eight cases where this power was used to order a new trial — less than one reversal per circuit, per decade.[24] Clearly, United States district judges — who are, after all, fully protected by the tenure and salary provisions of article III — are entirely capable of granting new trials where appropriate.

4. The effort required for appellate courts to find those few cases where the result is rational but where requiring a new trial nevertheless seems warranted, places an enormous burden on appellate courts. As Judge Newman recently explained in a decision reaffirming the Second Circuit rule against weight-of-the-evidence review originally announced by Judge Learned Hand:

---

[24] The LEXIS search was performed in the "Genfed" library, "USApp" file, searching for: "(weigh! w/2 evidence) w/25 new trial and date aft 1/1/86." The search produced (as of February 19, 1996) 753 cases, of which 555 were published cases. The eight cases which, at least arguably, involve reversals of the trial judge's refusal to grant a new trial on weight-of-the-evidence grounds are: *Eiland v. Westinghouse Elec. Corp.*, 58 F.3d 176, 183 (5th Cir. 1995); *Ross v. Black & Decker, Inc.*, 977 F.2d 1178, 1190 (7th Cir. 1992), *cert. denied*, 507 U.S. 917 (1993); *Standard Havens Products v. Gencor Industries*, 953 F.2d 1360, 1372 (Fed. Cir. 1991), *cert. denied*, 506 U.S. 817 (1992); *Insurance Co. of North America v. Valente*, 933 F.2d 921, 923-25 (11th Cir. 1991); *Ford Motor Co. v. Summit Motor Products, Inc.*, 930 F.2d 277, 301 (3rd Cir.), *cert. denied*, 502 U.S. 939 (1991); *Continental Cas. v. S.W. Bell Telephone Co.*, 860 F.2d 970, 973 (10th Cir. 1988), *cert. denied*, 489 U.S. 1079 (1989); *Jowers v. Nationwide Ins. Co.*, 832 F.2d 1246, 1255 (11th Cir. 1987); *Dadurian v. Underwriters at Lloyd's, London*, 787 F.2d 756, 762 (1st Cir. 1986).

It should be noted that eleven other cases contain language about weight of the evidence but actually appear to order a new trial on the ground that the result reached by the jury was irrational, based on the evidence at trial: *Pulla v. Amoco Oil Co.*, 72 F.3d 648, 656-57 (8th Cir. 1995); *Unisplay v. American Electronic Sign Co.*, 69 F.3d 512, 518-19 (Fed. Cir. 1995); *Cooper Distributing Co. v. Amana Refrigeration, Inc.*, 63 F.3d 262, 277-78 (3rd Cir. 1995); *Richards v. Michelin Tire Corp.*, 21 F.3d 1048, 1057 (11th Cir. 1994), *cert. denied*, 115 S. Ct. 902 (1995); *Brunneman v. Terra Intern., Inc.*, 975 F.2d 175, 178 (5th Cir. 1992); *Hendricks & Associates, Inc. v. Daewoo Corp.*, 923 F.2d 209, 220 (1st Cir. 1991); *Ashland Oil, Inc. v. Arnett*, 875 F.2d 1271, 1281 (7th Cir. 1989); *Williams v. Chevron U.S.A., Inc.*, 875 F.2d 501, 506-507 (5th Cir. 1989); *Katara v. D.E. Jones Commodities, Inc.*, 835 F.2d 966, 973 (2nd Cir. 1987); *Keeler v. Richards Mfg. Co., Inc.*, 817 F.2d 1197, 1202-1203 (5th Cir. 1987); *Pinner v. Schmidt*, 805 F.2d 1258, 1265 (5th Cir. 1986), *cert. denied*, 483 U.S. 1022, 1032 (1987).

> Review of a trial court's ruling assessing the weight of the evidence imposes on an appellate court far more of a burden than arises from review of a ruling rejecting a challenge to the sufficiency of the evidence. The latter ruling can be readily affirmed as soon as the reviewing court identifies adequate evidence in the record that permits the disputed issue to go to the jury, despite the existence of significant opposing evidence. Such review does not require an assessment of all the evidence. Reviewing a ruling on a "weight of the evidence" challenge, however, obliges a reviewing court to examine in some detail all of the evidence. That burdensome review is . . . not warranted . . . where a trial judge denies a "weight of the evidence" challenge and leaves in place a jury verdict supported by legally sufficient evidence.

Stonewall Ins. Co., 1995 U.S. App. LEXIS 35230, at *52-*53 & n. 13.[25] A holding that federal appellate courts have the authority to review for weight of the evidence implies a duty to exercise that power,[26] so that appellate judges will be saddled with a mandatory duty to read the entire record in each case, upon the request of any disgruntled litigant, unless and until Congress acts to lift that burden.

---

[25] *See also LaFollette v. Savage*, 63 F.3d 540, 544 (7th Cir. 1995) (noting that a weight-of-the-evidence argument "require[s] this court to thoroughly review the testimonial and documentary evidence admitted at trial."); *Whalen v. Unit Rig, Inc.*, 974 F.2d 1248, 1253 (10th Cir. 1992) (denying motion for new trial "[a]fter thorough review of the record"), *cert. denied*, 507 U.S. 973 (1993); *Jordan v. United States Lines, Inc.*, 738 F.2d 48, 49 (1st Cir. 1984) (Breyer, J.) (denying motion for new trial after "carefully reading the record").

[26] *See, e.g., Second Employers' Liab. Cases*, 223 U.S. 1, 58 (1912) ("The existence of the jurisdiction creates an implication of duty to exercise it, and that its exercise may be onerous does not militate against that implication."); *Cohens v. Virginia*, 19 U.S. (6 Wheat) 264, 404 (1821) ("We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given."); *Bank of the United States v. DeVeaux*, 9 U.S. (5 Cranch) 61, 87 (1809) ("The duties of this court, to exercise jurisdiction where it is confered, and not to usurp it where it is not conferred, are of equal obligation").

5. Finally, the burden is compounded by the fact that the very prospect of such review attracts large numbers of additional appeals. "[N]o matter how guarded the review may be said to be, [it is] an invitation to the litigant to take his case to the court of appeals, in the hope that it will find he falls within the new dispensation." Charles Alan Wright, *The Overloaded Fifth Circuit: A Crisis in Judicial Administration*, 42 TEX. L. REV. 949, 967 (1964).[27] Especially given "the current appellate capacity crisis in the Federal Courts of Appeals . . . born of spiraling federal filings and an increased tendency to appeal District Court decisions,"[28] "litigants would be better off, and

---

[27] *See also* Wright & Miller, *supra*, § 2819, at 204 ("So long as the appellate courts hold open any possibility of reversal on this ground, they invite litigants to come to them in countless cases arguing about the weight of the evidence. Thus, extra burdens are put on the appellate courts and the burdens are for no good purpose, considering how extraordinarily rare it is that there is ever a reversal on this ground.").

The temptation to appeal simply to invoke weight-of-the-evidence review is especially great because an appeal — even on the entire record — entails a fraction of the cost of the trial, now that trial records need no longer be commercially printed but may instead be cheaply photocopied. Hon. Ruggero J. Aldisert, WINNING ON APPEAL 8-9 (1992). As Judge Aldisert has observed, emotion-laden clients increasingly respond to a loss at trial with the attitude: "'I got a raw deal. Hey, it's just a crap shoot and maybe I'll be lucky.' Most people think cases are retried *de novo*. They simply cannot recognize that courts of appeals have limited review powers." *Id.* at 8.

[28] Remarks of Chief Justice William H. Rehnquist, Tenth Annual Judicial Conference of the United States Court of Appeals for the Federal Circuit, 146 F.R.D. 256, 257 (Apr. 30, 1992). *See also Behrens v. Pelletier*, 64 U.S.L.W. 4081, 4088 (U.S. Feb. 21, 1996) (Breyer, J., joined by Stevens, J., dissenting) ("overloaded dockets threaten the federal appellate system"); Judicial Conference of the United States, Long Range Plan for the Federal Courts 132 (Dec. 1995) ("If conditions seriously deteriorate in the court of appeals, it may be necessary to consider some limitations on the right of appeal"); Hon. Edith H. Jones, *Back to the Future for Federal Appeals Courts: Rationing Federal Justice by Recovering Limited Jurisdiction*, 73 TEX. L. REV. 1485, 1488 (1995) (noting "unremitting recourse to federal courts and an increasing rate of appeals to courts with already critically strained resources"); Hon. Stephen Reinhardt, *Surveys Without Solutions: Another Study of the United States Courts of Appeals*, 73 TEX. L. REV. 1505, 1512 (1995) ("the drastic and sometimes counterproductive measures we have undertaken have not significantly alleviated the problems resulting from

appellate court loads substantially lightened, if appellate review were clearly understood to be limited to serious errors of law, rather than to include a second evaluation of shadowy questions of a factual nature." Wright, *supra*, 42 TEX. L. REV. at 968.

CONCLUSION

The judgment of the Court of Appeals should be reversed.

Respectfully submitted.

ARTHUR R. MILLER
1545 Massachusetts Avenue
Cambridge, MA 02138

AKHIL REED AMAR
127 Wall Street
New Haven, CT 06520

DANIEL R. COQUILLETTE
885 Centre Street
Newton Centre, MA 02159

ARTHUR F. MCEVOY
Counsel of Record
975 Bascom Mall
Madison, WI 53706
(608) 265-4771

ERWIN CHEMERINSKY
699 Exposition Blvd.
Los Angeles, CA 90089

WILLIAM B. HIRSCH
CHRISTINE J. ANDERSON
LIEFF, CABRASER, HEIMANN & BERNSTEIN
275 Battery Street
30th Floor
San Francisco, CA 94111

ARTHUR H. BRYANT
WILLIAM A. ROSSBACH
TRIAL LAWYERS FOR PUBLIC JUSTICE, P.C.
1717 Massachusetts Ave., N.W.
Washington, D.C. 20036
(202) 797-8600

KENNETH J. CHESEBRO
1600 Massachusetts Avenue
Cambridge, MA 02138

JONATHAN S. MASSEY
3920 Northampton St., N.W.
Washington, D.C. 20015

Counsel for *Amici Curiae*

March 1, 1996

[the] grossly excessive workload" of the federal appellate courts); Hon. Stephen Breyer, *Administering Justice in the First Circuit*, 24 SUFFOLK UNIV. L. REV. 29, 33 (1990) (noting grounds for serious doubt about the value of "opinions that, *on average*, can take no more than two or three days of a judge's own time"); Hon. Howard T. Markey, *On the Present Deterioration of the Federal Appellate Process: Never Another Learned Hand*, 33 S.D. L. REV. 371, 374, (1988) ("The role of the judge as contemplative craftsman and reflective scrivener has eroded to virtual extinction."). *See generally* Thomas E. Baker, RATIONING JUSTICE ON APPEAL: THE PROBLEMS OF THE U.S. COURTS OF APPEALS 31-51 (1994); Hon. Richard A. Posner, THE FEDERAL COURTS: CRISIS AND REFORM 59-129, 317-21 (1985).